

Discussion Item: Considerations Associated with the Temporary Suspension of the Division of Hearings' Preparation of Transcripts

All proceedings conducted by the Natural Resources Commission's (*Commission*) Division of Hearings (*Division*) under I.C. §§ 4-21.5-3-1 et seq., commonly referred to as the Administrative Orders and Procedures Act, or AOPA, are required to be recorded by the Division. I.C. 4-21.5-3-25(g). However, an agency, including the Commission, "is not required, at its expense to prepare a transcript, unless required to do so by law..." *Id.*

Typically it is a party initiating judicial review of a final agency order resulting from a proceeding under AOPA who seeks a transcript of the hearing from the recording. That party is also, in most cases, responsible for the costs associated with the preparation of the transcript, whether prepared by a Commission employee or by a court reporting company approved by the Commission. I.C. 4-21.5-5-13. The Commission, in preparing such transcript, is *required* to charge a fee for the preparation of the transcript along with additional reasonable costs associated with copying expenses and delivery. I.C. 4-21.5-5-13(d).

To assist in the implementation of AOPA the Commission adopted 312 IAC 3, with Section 14 specifically addressing court reporters and transcripts as follows:

Sec. 14. (a) The commission (or, for administrative review of orders under IC 25-17.6, the Indiana board of licensure for professional geologists or under IC 25-31.5, the Indiana board of registration for soil scientists) *shall employ and engage the services of a stenographer or court reporter, either on a full-time or a part-time basis, to record evidence taken during a hearing.*

(b) A party may obtain a transcript of the evidence upon a written request to the administrative law judge.

(c) *The party who requests a transcript under subsection (b) shall pay the cost of the transcript:*

(1) as billed by the court reporting service; or

(2) if the transcript is prepared by an employee of the commission, as determined from time to time by the commission on a per page basis after consideration of all expenses incurred in the preparation of the transcript.

(d) For a proceeding in which the commission or its administrative law judge is the ultimate authority, a court reporter who is not an employee of the commission will be engaged to record a hearing upon a written request by a party filed at least forty-eight (48) hours before a hearing.

Emphasis added.

The Commission is mandated by 312 IAC 3-1-14(a) to employ a court reporter either on a full or part time basis to record the evidence received during an administrative hearing in a proceeding conducted under AOPA¹. However, subsection (c) makes clear that a transcript may be prepared by a Commission employee or by a court reporting service. Pursuant to I.C. 4-21.5-5-13, if the

¹ While the Division had, for a time, sought to contract with a court reporting service to record its proceedings conducted under AOPA, such an action would have been contrary to the application of 312 IAC 3-1-14(a).

transcript is being obtained for purposes of judicial review any court reporting agency utilized to prepare the transcript is required to be approved by the Commission.

From near in time to the establishment of the Division, which occurred officially on July 1, 1990 through the governor's approval of a January 25, 1990 Commission resolution, which was required by the passage of P.L. 28-1990, the Commission has employed a full time court reporter. A portion of court reporter's duties is the preparation of transcripts upon request by parties².

The Commission, in accordance with 312 IAC 3-1-14(c)(2), has established the fee for a transcript prepared by an employee of the Commission through "Information Bulletin # 1, Establishment of Division of Hearings; Indexing of Final Adjudicative Agency Decisions; Transcript Fees", a nonrule policy document posted to the Indiana Register at <http://www.in.gov/legislative/iac//20120321-IR-312120148NRA.xml.html>. The current fee for transcripts prepared by a Division employee was established in 2012 at \$3.80 per page. The cost for preparation of a transcript by a court reporting service is reported to be approximately \$5.00 - \$6.00 per page³.

The Division receives few requests for transcript preparation; however, the preparation of a single transcript consumes numerous hours of staff time. Over the years, Division staff has been able to estimate certain averages with respect to transcripts. For instance, typically one hour of recorded hearing will produce a transcript approximately 43 pages in length and a six-hour hearing would generally require the Division's court reporter approximately 60 days to complete while also maintaining other duties.

Records of the Division have been researched to ascertain that one transcript was prepared in 2013 and two were prepared in 2014, which means that only three parties sought transcripts. The one transcript prepared in 2013 was 436 pages in length and would have required approximately 90 days to complete while the combined total pages of the two transcripts prepared in 2014 was 365 and would have taken approximately 75 days for completion. The total fees charged for these transcripts was approximately \$3,043.

With the recent retirement of the Division's court reporter in August 2014 all of the administrative support for the Division has fallen to the responsibility of the Division's paralegal. Included within these added responsibilities is the requirement to serve as a court reporter to record hearings in proceedings under AOPA to comply with 312 IAC 3-1-14(a), maintain the Division's docket system (which comprises a portion of the official record of all AOPA proceedings), as well as all transcription and numerous other responsibilities. The Division has been advised that the vacancy created by the retirement of its court reporter is not expected to be filled within the near future.

The exact impact of transcript preparation upon the Division would vary based upon other activities ongoing at the time a transcript request is made.⁴ However, in a general sense it could

² Predominantly, transcripts are requested by parties taking judicial review of a Commission Final Order. While there may have been instances of transcript preparation for other reasons no such occasion is known.

³ As reported by Accurate Court Reporting, Inc.

⁴ It was considered that the Division could agree to prepare transcripts on a case-by-case determination but such subjectivity is fraught with the potential to create an appearance of impropriety, favoritism, and conflict; therefore, this method is not favored.

be assured that with the Division's paralegal serving as the sole source of administrative support the time necessary to prepare transcripts will likely increase⁵ while other responsibilities of the paralegal would most assuredly suffer from delay, which would impact the overall functioning of the Division.

Acting to temporarily suspend transcript preparation services would not have broad-based impact upon Commission constituents. Only those few individuals who need a transcript prepared will be impacted and the extent to which those limited number of constituents will be impacted appears, realistically, to be minimal. For instance, at \$6.00 per page the transcripts prepared by the Division in 2013 and 2014 would have a cost of \$4,806, instead of the \$3,043 charged to those three parties by the Division. However, the suspension of transcript preparation would better allow for more consistent overall Division operation and for broad-based service to the public to be undisturbed.

Numerous other administrative agencies have been consulted and nearly all agencies utilize contracted court reporting service for the preparation of transcripts when needed. Some of the agency administrative law judges have indicated that after reviewing the transcripts prepared by a contracted court reporting service they have found inaccuracies requiring correction. While the Division's staff will have to be diligent in the review of transcripts prepared by contracted court reporting agencies, such review will certainly be less time consuming than transcript preparation. Also, the preparation of transcripts is a service that the Commission has historically provided that provides convenience to the parties and ensures accuracy at a reduced cost.

This action to temporarily suspend transcription services in no manner alleviates the need for the Division to hire a court reporter. That position is highly necessary to efficient functioning of the Division and the professional maintenance of accurate Division records. Regardless of the action taken on this issue, the Division will continue advocating the immediate filling of its court reporter position in order to avoid the need for any future service suspensions or delays. It would be the intent to immediately reinstate transcription preparation service upon filling of this vacancy.

⁵ The increase in time necessary to prepare a transcript is unfortunate in light of the recent order of the Indiana Supreme Court amending Rule 11 of the Indiana Rules of Appellate Procedure to reduce the time allowed for a trial court to produce the record of a proceeding from ninety (90) to forty-five (45) days.